Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Revision of Part 22 and	)	WT Docket No. 96-18
Part 90 of the Commission's	)	
Rules to Facilitate Future	)	
Development of Paging	)	
Systems	)	
	)	
Implementation of	)	PP Docket No. 93-253
Section 309(j) of the	)	
Communications Act--	)	
Competitive Bidding	)	

To: The Commission

COMMENTS OF PRONET INC. ON INTERIM LICENSING PROPOSAL

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SUMMARY

ProNet, the country's fifth largest paging operator, will have its plans for major network expansion and technological advancement nullified by the Interim Proposal, which is anti-incumbent, anti-competition and anti-consumer in its present form. Due to the Interim Proposal, ProNet has already been forced to defer substantial investments in new equipment and personnel, and to abandon an infrastructure-sharing agreement with another carrier. The Interim Proposal will unambiguously curtail economic growth in the paging industry.

By retroactively shrinking existing interference contours accorded 929 and 931 MHz licensees, prohibiting even modest system modification and expansion applications, and withholding action on longstanding requests for 929 MHz channel exclusivity, the Interim Proposal will block incumbents like ProNet from responding to consumer demand within their existing service areas, and will deter them from installing spectrally efficient FLEX infrastructure.

The freeze the Interim Proposal imposes on CCP applications accepted for filing after December 6, 1995, and PCP applications filed with frequency coordinators (but not the Commission) on or before February 9, 1996 is impermissibly retroactive. Because many 931 MHz applications were already postponed due to the Commission's processing backlog, and because Public Notice of these applications was delayed by consecutive government closings from November 1995 to present, the freeze is arbitrary. The exemption for nationwide licensees, who are free to build out and convert their systems to

FLEX while non-nationwide licensees cannot, makes the freeze discriminatory.

To avoid inflicting further harm, the Interim Proposal should be revised to:

- restore the current minimum 70 mile fixed radius interference contours provided by Sections 22.537(f) and 90.495(b) of the Rules;
- authorize incumbent paging operators to apply during the interim period for new transmitting facilities within 40 miles of any of their existing sites;
- allow another class of permissive system modifications, i.e., those immune from the filing of competing applications (due to the configuration of existing service and interference contours), in addition to those that keep existing 70 mile interference contours intact;
- abandon the retroactive freeze; rather, the Commission should process: (1) all CCP applications filed on or before February 9, 1996; and (2) all PCP applications received by a frequency coordinator (but not by the Commission) on or before February 9, 1996; and
- require Commission action on all pending requests for 929 MHz channel exclusivity.

In addition, the Commission should clarify the Interim Proposal to make clear that Section 22.142(d) relocation requests, requests for Special Temporary Authority, and amendments which resolve mutual exclusivity will be accepted and disposed of during the interim period. Finally, non-exclusive PCP frequencies (including Special Emergency Radio Service paging channels) should be exempt from all restrictions imposed by the Interim Proposal.

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ProNet Inc. ("ProNet"), through its attorneys and pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. § 1.415, hereby submits its Comments with respect to the Interim Licensing Proposal ("Interim Proposal") in the above-captioned rulemaking proceeding ("NPRM").

I. STATEMENT OF INTEREST

ProNet is a publicly-traded company with extensive experience in developing and operating wide-area paging networks. For over ten years, ProNet chiefly provided wide-area simulcast paging service to medical professionals in major markets throughout the United States. This service is provided using frequencies assigned to the Special Emergency Medical Service ("SERS"), as well as private carrier frequencies in the Business Radio and 929 MHz bands.

In 1993, ProNet embarked on an aggressive acquisition program involving both common carrier paging ("CCP") and private carrier paging ("PCP") systems. Because of this program's success, ProNet is now the fifth largest paging carrier in the nation, operating in all CCP and PCP bands and serving approximately 1,000,000 subscribers throughout the country. Prior to the Interim Proposal's release on February 9, 1996, ProNet's business plan projected about 1,000 new net subscribers per day.

Under its acquisition program, ProNet is no passive aggregator of paging subscribers. Each acquisition entails follow-on capital investment to upgrade and expand existing infrastructure with high-speed transmitters and satellite control links, while eliminating redundant switching and interconnection gear. In the past year, wholly-owned ProNet subsidiaries have installed over fifty new transmitters and have applied for more than three hundred new transmitting facilities in the 929 MHz and 931 MHz bands. In metropolitan New York City, Chicago, eastern Texas and southern Florida, ProNet has integrated two or more smaller systems into a commonly-controlled network, allowing it to realize significant economies of scale.

Because of ProNet's acquisition and infrastructure investment programs, the paging industry has experienced increased price and quality competition, more consumer choice and an accelerated rate of technological innovation. For the reasons set forth below, however, the Interim Proposal makes it exceedingly difficult for ProNet to continue expanding and enhancing both its existing paging

systems and those it plans to acquire. As a result, the Interim Proposal will diminish competition, lessen consumer choice and repress technological advances in paging.

II. THE INTERIM PROPOSAL BARS INCUMBENT LICENSEES FROM IMPLEMENTING ESSENTIAL SITE ADDITIONS AND MODIFICATIONS

While asserting a "desire to allow incumbent licensees to respond to consumer demand" during this rulemaking's pendency (NPRM at para. 140), the Interim Proposal actually prohibits incumbents from accommodating existing and projected demand, or meeting competition in the marketplace. By compressing the interference protection currently accorded 929 and 931 MHz licensees, and prohibiting even modest system modification and expansion applications, the Interim Proposal displays near total hostility to routine needs of existing operators and their desire to install advanced technology RF systems that will improve service quality and spectral efficiency. Considering these remarkably deleterious impacts, one wonders how the Commission could ever conclude that the Interim Proposal's provisions were "noncontroversial and unlikely to provoke public comment" (NPRM at para. 157).

If incumbents are to be able to respond to consumer demand, the Interim Proposal must be replaced with interim rules that retain existing interference contours, allow reasonable system expansion-- to accommodate new technologies and increased public demand-- and enable meaningful modifications on a permissive basis.

A. The Revision to 929/931 MHz Interference Contours

In paras. 49-55, the NPRM proposes, subject to receipt and consideration of public comment, replacing the existing definition of service and interference contours for 929 and 931 MHz paging facilities based on circles of standard radii with a mathematical formula that generates an eight radial contour. Later in the NPRM (at para. 140, footnote 271), this rudimentary proposal is abruptly imposed as the controlling standard for all 929 and 931 MHz interference contours for this rulemaking's duration. Without notice or comment, the Interim Proposal retroactively revised the prevailing interference contour rules for all 929 and 931 MHz licensees.[1/]

The new formula reduces the interference contour of most transmitters in ProNet's (and other carriers') 900 MHz networks.[2/] From the perspective of a multi-system operator (like ProNet) that controls hundreds or thousands of transmitting sites, the cumulative effect of the Interim Proposal's impulsive revision in interference contours will:

[1/] See Sections 22.537(f) and 90.495(b) of the Rules.

[2/] For a hypothetical 931 MHz transmitter operating at 500 watts, 150 meters AAT, the new formula compresses the interference contour's radius from 80.5 km to 55 km, a 25 km swath which equates to a reduction of 6745 square miles in this single transmitter's potential serving area.

- **shrink** the geographic area protected by the pre-existing interference contour rules by tens of thousands of square miles, curtailing service availability and quality to current and prospective customers;[3/]

- **preclude** 931 MHz carriers (and, under the Interim Proposal, 929 MHz carriers as well) from installing numerous additional transmitters on a permissive basis as envisioned by para. 140;[4/] and

- **invalidate** the design of all 929/931 MHz systems engineered according to the longstanding 70 mile minimum interference contours, imposing substantial costs on carriers merely to re-evaluate existing plans.

Imposing the new interference formula during this rulemaking's pendency invalidates Sections 22.495(b) and 90.537(f) of the Rules without any notice or opportunity for comment. For this reason, the new interference formula indisputably violates Section 553(b) of the Administrative Procedure Act ("APA").[5/] Enforcing the new formula during the interim period substantially modifies existing 929 and 931 MHz licenses without a prior hearing, an unambiguous violation of Section 316 of the Communications Act of 1934, 47

[3/] Exhibit 1 hereto is a map comparing the composite 70 mile and newly-imposed interference contour for a 931.4875 MHz network in eastern Texas licensed to Metropolitan Houston Paging Services, Inc. ("MHPS"), a wholly-owned ProNet subsidiary. The attached map plainly depicts the enormous loss of interference-protected territory the Interim Proposal will inflict on MHPS.

[4/] Although para. 140 relaxes the standard for permissive "fill-in" transmitters under Sections 22.165(d) of the Rules by eliminating the requirement that service contours be unchanged, the reduction of interference contours renders this relief meaningless.

[5/] 5 U.S.C. §553(b). Because the mathematical formula mandated by the Interim Proposal substantively changes the criteria used to compute interference contours, the Commission is barred from claiming that it is "merely procedural," and thus exempt from APA notice and comment requirements. Reeder v. FCC, 865 F.2d 1298, 1304-05 (D.C. Cir. 1989).

U.S.C. §316.[6/]

B. Critical System Expansions And Modifications Have Been Halted

The Interim Proposal allows an incumbent licensee to add new or modify existing sites only if no expansion in the pre-existing composite interference contour ensues. As already discussed, however, the Interim Proposal (NPRM at para. 140) covertly revises every incumbent's interference contours by substantially diminishing, in most cases, the geographic area those contours encompass.

The Interim Proposal thus delivers a one-two punch to an incumbent operator's ability to respond to consumer demand. Specifically, incumbents will be precluded from: (a) serving existing subscribers who relocate to an area marginally outside an existing coverage footprint; (b) meeting new demand in these peripheral areas; or (c) fully competing with other paging carriers. ProNet has already experienced these repercussions of the Interim Proposal when it was foreclosed from serving an existing subscriber who is opening a large warehouse facility on the periphery of an existing coverage contour; this single account represented about five hundred paging units.

[6/] Section 316 of the Act provides, in pertinent part, that

> No such order of modification shall become final until the holder of the license or permit shall have been notified in writing of the proposed action and the grounds and reasons therefor, and shall be given reasonable opportunity, of at least thirty days, to protest such proposed order of modification . . . .

C. Technological Innovation Has Been Jeopardized

Virtually every medium to large paging carrier is either converting older 512 or 1200 baud POCSAG RF networks to 3200 or 6400 baud-capable FLEX technology, constructing new FLEX systems, or planning to do one or the other. FLEX's higher signalling speed makes it typically four times as spectrally efficient as the POCSAG protocol it replaces-- precisely the type of technological innovation the Commission customarily and enthusiastically supports. Remarkably, however, the Interim Proposal effectively compels incumbent licensees to suspend all existing or planned FLEX conversions.[7/]

The increased signalling speed or system throughput associated with FLEX requires an elevated signal level at the paging receiver. As a result, more transmitters are needed to serve the same geographic area with FLEX than with POCSAG.[8/] If, for example, a single site 512 baud POCSAG transmitter can serve a circular area

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[7/] By compelling incumbents to suspend FLEX conversions, the Interim Proposal demonstrates its inherent bias for 929 and 931 MHz nationwide licensees, who are exempt from any constraint or restriction attending this proceeding. Nationwide carriers-- who often use their frequencies to provide local, regional or state-wide coverage-- can convert existing infrastructure to FLEX or build new FLEX-capable RF networks without any concern for the Interim Proposal; thus, they have a substantial competitive advantage over their marketplace rivals. See text at pp. 17-18, infra.

[8/] MHPS's planned conversion of its roughly 70 site Texas network from 1200 baud POCSAG to 6400 baud- capable FLEX with no corresponding increase in true coverage will require 135 transmitting sites-- and an inevitable but now impermissible expansion in its composite interference contour as determined in accordance with mathematical formula mandated by the Interim Proposal.

with a twenty mile radius, as many as four transmitters may be necessary to cover the same area when converting to 6400 baud FLEX.

Accommodating the additional transmitters invariably entails expanding existing composite service and interference contours--precisely what the Interim Proposal forbids. Thus, the Interim Proposal will prevent FLEX conversions from occurring in a way that allows licensees to realize this technology's full potential.

D. Incumbent Licensees Should Be Allowed To Implement Moderate System Expansions

To allow incumbent licensees to respond to normal consumer needs and to encourage conversion to spectrally efficient FLEX technology, the Interim Proposal should be revised to authorize moderate expansions of licensed systems. Enabling incumbents to undertake these expansions will strike the balance, so clearly missing from the Interim Proposal, between a carrier's obligation to meet consumer demand and the Commission's goal of transitioning to market area licensing.

Based on an analysis of near term demand growth in its principal markets and its scheduled FLEX build-outs and conversions, ProNet has determined that allowing new transmitting facilities within forty (40) miles of its authorized sites should accommodate most customer-initiated demands for footprint expansion and implementation of both new FLEX infrastructure and previously planned FLEX retrofits. Limiting the expansion zone to forty miles also comports with the geographic standard now used to enforce the Commission's existing one-to-a-market policy, which is codified in

Section 22.539 of the Rules. Notably, only incumbent licensees could file these expansion applications, thus allaying concerns that this revision to the Interim Proposal will foment speculative applications.

Coupled with retention of minimum 70 mile interference contours for all licensed 929 and 931 MHz facilities and a commitment to process fully all applications filed on or before the NPRM's release date (as discussed below), an allowance for moderate system expansions will preserve the rationale for market area licensing without crippling incumbent carriers.[9/]

E. Permissive System Modifications

The Commission's proposal to allow on a permissive basis any system modifications that do not exceed existing interference contours is commendable, but woefully inadequate. First, as previously discussed, the simultaneous employment of reduced interference contours renders this proffered relief worthless; permissive modifications must be based on the existing 70-mile interference contours. Second, permissive modifications should also include expansion into territories not encompassed by existing

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[9/] The suggestion that short-term licensing of system expansions on a secondary basis may alleviate the Interim Proposal's debilitating impact on non-nationwide incumbents (NPRM at para. 143) is misplaced. Secondary licensing puts the licensee, its customers and its financiers in an untenable position because risk of involuntary termination is so high. Use of interim secondary licensing in the embryonic 900 MHz SMR service has little relevance here because paging is a mature, intensely competitive industry; thus, restraining incumbents from fully competing (by licensing them on a secondary basis) to protect prospective competitors who are acquiring their spectrum through auction is both counter-productive and counter-intuitive.

interference contours but, because of existing contours, no other applicant would be able to engineer a valid competing application, i.e., without encroaching on the existing system. Treatment of such additional transmitting sites as permissive modifications will enable more meaningful "fill-in" and coverage of dead spots within existing networks without in any way prejudicing future applicants.

III. TREATMENT OF PENDING APPLICATIONS UNDER THE INTERIM PROPOSAL IS UNDULY ONEROUS, ANTI-CONSUMER AND DISCRIMINATORY

Under the Interim Proposal, a retroactive freeze is imposed on all pending CCP applications that were within the cut-off period for competing applications on February 8, 1996, while all 929 MHz exclusivity requests are held in abeyance until such time as the Commission can characterize them (albeit erroneously) as moot. These provisions are already harming ProNet and depriving its subscribers of the high quality service their paging supplier eagerly seeks to provide. At the same time, 929/931 MHz nationwide licensees, many of whom provide local and regional service on their nationwide frequencies, avoid these constraints completely and, unless the Interim Proposal is revised substantially, will reap an enormous competitive windfall as a result.

A. The Retroactive Freeze On Pending 931 MHz and Low-Band CCP Applications Must Be Lifted

Under the Interim Proposal, Commission action will be withheld from any pending 931 MHz or low-band CCP application that, as of February 8, 1996 (the NPRM adoption date), was within the period for filing mutually exclusive applications. As a result, all 931 MHz applications accepted for filing after the Public Notice

released December 6, 1995, and all low-band applications accepted after the December 13, 1995 Public Notice are frozen until WT Docket No. 96-18 has been concluded.[10/] As shown below, this freeze is impermissibly retroactive, patently arbitrary and unrelated to the NPRM's self-avowed policy goals.

A Retroactive Freeze is Impermissible-- Notice of the instant freeze first occurred on February 9, 1996, when the NPRM was released.[11/] Because the freeze has retrospective effect, it has paralyzed 931 MHz applications filed as long ago as November 1995. When these applications were filed, however, there was absolutely no basis for anticipating that they would ever be subject to an ex post facto freeze.

Because the Interim Proposal is retrogressive, filers of 931 MHz applications from November 1995 to February 9 proceeded without knowledge of Commission requirements for, or intentions regarding, their applications. The Commission has been admonished repeatedly

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[10/] Although the Rules establish a thirty day cut-off for low-band CCP applications, no narrowband Public Notices were issued between December 13, 1995 and January 17, 1996 due to the furloughs and inclement weather during this period.

[11/] For this reason, the Interim Proposal's use of the NPRM adoption date to fix the cut-off for accepting new applications (NPRM at para. 139) and for establishing a retroactive freeze on pending applications (id. at para. 144) is improper. Section 1.4(b)(1), (3) of the Commission's Rules state that public notice of rulemaking documents occurs either on the date of publication in the Federal Register, or on the release date of the document itself; under Section 0.445(e), "[n]o person is expected to comply with any requirement or policy of the Commission unless he has actual notice of that requirement or policy . . ." Accordingly, any conclusion of applicant rights pursuant to the Interim Proposal may not pre-date February 9, 1996, the NPRM's release date.

about ensnaring applicants in such a predicament,[12] but this is exactly what the Interim Proposal does.

The Interim Proposal is a "rule," under the APA.[13] Thus, the Interim Proposal's legal consequences must be wholly prospective, unless Congress expressly conveyed the power to promulgate retroactive rules to the Commission.[14] The Communications Act conveys no such express power, and no other statutory basis for such power is cited in the NPRM. Stated briefly, the Interim Proposal's attempt to impose a retroactive freeze is ultra vires the Commission.

Nor can the Commission insulate the freeze from the APA's prior notice and comment requirements by characterizing it, so predictably, as "procedural in nature" (NPRM at para. 157). The exception for procedural rules must be construed very narrowly and is plainly inapplicable where the rule in question changes

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[12] McElroy Electronics Corp. v. FCC, 990 F.2d 1351, 1358 (D.C. Cir. 1993) (quoting Maxcell Telecom Plus, Inc. v. FCC, 815 F.2d 1551, 1558 (D.C. Cir. 1987).

[13] The APA's definition of "rule" pertinently states that a rule

> means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency . . . .

5 U.S.C. §551(4) (emphasis added).

[14] Bowen v. Georgetown University Hospital, 488 U.S. 204, 208 (1988).

substantive criteria.[15/] The Reeder Court held that rules modifying substantive criteria for evaluating FM station allotment counterproposals required prior notice and comment because they "permanently foreclosed the petitioners from pursuing their upgrade plans." Id. at 1305.[16/] The retroactive freeze imposed by the Interim Proposal likewise bars ProNet and other incumbents from permanently upgrading their licensed systems and, as a result, must be subject to APA notice and comment.[17/]

A Retroactive Freeze is Arbitrary-- Whether a CCP application will be processed under the Interim Proposal depends, as discussed above, when that application appeared on Public Notice, which may have been delayed by the Commission's internal processing,[18/] and

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[15/] Reeder v. FCC, 865 F.2d 1298, 1305 (D.C. Cir. 1989). Assuming arguendo the retroactive freeze were deemed "procedural," it "must be subject to public comment" if it "jeopardizes the rights and interests of parties . . ." Batterton v. Marshall, 648 F.2d 694, 708 (D.C. Cir. 1980). Under this holding, the retroactive freeze at issue here, implemented without any public comment, is void ab initio.

[16/] In Reeder, as here, the Commission had also "briefly mentioned" other justifications, generally unsupported and totally lacking in merit, for failure to comply with the APA's notice and comment requirements.

[17/] The cases cited in the NPRM (at para. 157, footnote 285) in support of the procedural rule exception are unavailing. Kessler v. FCC, 326 F.2d 673 (D.C. Cir. 1963) involved a purely prospective freeze. Neighborhood TV Co., Inc. v. FCC, 742 F.2d 629 (D.C. Cir. 1984) and Buckeye Cablevision, Inc. v. U.S., 438 F.2d 948 (6th Cir. 1971) involved temporary freezes, which did not preclude eventual grant of the applications subject thereto.

[18/] Applications typically appear on Public Notice approximately two weeks after the date of filing. The Commission apparently fails to grasp the implications of this lag time; at para. 146, footnote 277 of the NPRM, the Commission calculates the cut-off date for low-band CCP applications according to the filing date rather than the date of Public Notice.

by federal government closings due to inclement weather and budgetary matters-- variables over which applicants have no control.[19/] Pending applications whose processing has been immobilized by the retroactive freeze might have been grantable under the Interim Proposal had the Commission been spared the budget crises and blizzards of the past few months.

Tying the cut-off to prior Public Notices is particularly unfair for 931 MHz applicants. As recently acknowledged, the Commission is only now completing processing of applications filed in 1994, and has not yet begun to process applications filed in 1995![20/] Until those applications are granted and the underlying facilities constructed and placed in operation, 931 MHz carriers like ProNet are barred from requesting additional, co-located frequencies by Section 22.539 of the Rules. Thus, carriers adversely affected by protracted delays in 931 MHz application processing are penalized again under the Interim Proposal for striving to comply with Section 22.539.

A Retroactive Freeze Is Unnecessary-- Eliminating the freeze's retroactivity by processing all applications received on or before the NPRM's release date will, admittedly, allow filing of mutually exclusive applications during the appropriate filing windows that ensue. Additional MX applications, however, in no way

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19/ From November 1995 to February 1996, the Commission was closed four days because of inclement weather and 17 days due to the budget impasse.

20/ See Public Notice, "FCC Completes First Run of Its New Software for the Processing of 931 MHz Paging Applications," DA 96-219, released February 22, 1996.

offend the NPRM's objectives. Indeed, the NPRM (at para. 1) envisions competitive bidding as the optimal method for resolving MX applications, "so that available channels may be assigned rapidly to applicants who will expedite service to the public."

As demonstrated above, the retroactive character of the Interim Proposal's CCP freeze must be abandoned. The Commission must fully and finally dispose of each 931 MHz and low-band CCP application it received on or before February 9, 1996.

B. Processing Of 929 MHz Exclusivity Requests And Applications Should Be Clarified And Revised

According to the Interim Proposal (NPRM at paras. 147-48), non-mutually exclusive PCP applications filed before the NPRM's adoption date (February 8, 1996) will be processed, but all pending requests for conditional and permanent exclusivity will be postponed until the instant rulemaking is concluded. These aspects of the Interim Proposal must be clarified and revised for the following reasons:

First, as explained above (see text at note 11, supra) concluding applicant rights as of the NPRM adoption date offends the Commission's own rules. Accordingly, the operative date for processing non-mutually exclusive PCP applications must be the day the NPRM was released or published in the Federal Register.

Second, Section 90.175 of the Rules requires PCP applications to be filed initially with a frequency coordinator. The time interval between that filing and when the coordinator tenders the application to the Commission depends on multiple variables over which the applicant has no control. Terminating processing of PCP

applications according to when they were filed with the FCC would be exceedingly unjust and arbitrary; applications filed with the coordinator before the NPRM's release date but tendered to the Commission thereafter would be frozen retroactively. For these reasons, the operative date must be when the applications were filed with the coordinator.

Third, as far as ProNet can determine, the Commission has granted conditional exclusivity to pending 929 MHz applicants on only one occasion-- in a May 1994 Public Notice.[21/] Apart from the 154 exclusivity requests covered by that Public Notice, apparently no subsequent requests have been acted on by the Commission.[22/] As a result, the number of presently pending exclusivity requests is huge.

Under the Interim Proposal (NPRM at para. 148), consideration of each such pending exclusivity requests will be postponed because, if rules for geographic licenses are ultimately adopted, "all existing PCP facilities would receive full protection as incumbents, and such pending exclusivity requests would be moot." NPRM footnote 271, as discussed earlier, subjects all "existing PCP facilities" to a vast diminution in the interference protection to which they are entitled. Were the Commission to grant the pending exclusivity requests, these licensees would have the 70 mile plus protection codified in Section 90.495(b).

[21/] Public Notice, "Private Radio Bureau Announces 929-930 MHz Paging Operators Qualifying for Local, Regional, and Nationwide Exclusivity," DA 94-546, released May 27, 1994.

[22/] This view seems to be confirmed by the NPRM at para. 17.

Deferring numerous pending 929 MHz exclusivity requests is, therefore, hardly benign. Rather, it is part of the Interim Proposal's attempt to shrivel the interference protection to which all 929/931 MHz paging licensees are presently entitled in order to increase the value of the geographic licenses offered for competitive bid. Because such objectives are specifically prohibited by the Communications Act, suspending the pending exclusivity requests is improper.[23/] The Commission should act on these requests, while abandoning its precipitous imposition of a 21 dBuV/m interference contour for 929 and 931 MHz licensees.

C. The Interim Proposal Confers A Vast Competitive Windfall On Nationwide 929 and 931 MHz Licensees

The Interim Proposal imposes no constraints on additional site applications by 929 and 931 MHz nationwide licensees. These entities can extend coverage in response to consumer needs and to compete with rival carriers because the NPRM rejects geographic licensing for nationwide channels. Installation of new sites by nationwide licensees will have no effect on spectrum availability for auction participants and, therefore, "is consistent with the goals of this rulemaking" (NPRM at para. 142).

This free ride for nationwide 929 and 931 MHz licensees will skew competition because these licensees use their nationwide frequencies to provide local, regional and state-wide service in direct competition with non-nationwide carriers, like ProNet.

[23/] Section 309(j)(7)(B) of the Act flatly prohibits the Commission from employing auctions "solely or predominantly on the expectation of Federal revenues from the use of a system of competitive bidding . . ." 47 U.S.C. §309(j)(7)(B).

Unconstrained by the Interim Proposal, the nationwide licensees will reap an immense competitive advantage where they vie with carriers who are completely prohibited from expanding or modifying their service contours and whose pending applications have been quarantined by the retroactive freeze. To minimize this distortion, the Interim Proposal should eliminate the retroactive freeze on applications filed on or before February 9, 1996, restore the 70-plus mile interference contour for all authorized 929 and 931 MHz facilities, and commit to final disposition of all pending 929 MHz exclusivity requests prior to adoption of final rules in WT Docket No. 96-18.

IV. PRONET'S BUSINESS PLANS WILL BE DEVASTATED BY THE INTERIM PROPOSAL

If implemented, the Interim Proposal will have several short and medium-term ramifications for ProNet's business plans, all negative. Absent the Interim Proposal, ProNet intended to proceed with licensing, construction and operation of five geographically-diverse, wide-area regional or statewide networks with the expectation of realizing thirty (30) per cent net growth in its existing subscriber base, or about 1,000 new net subscribers per day. As noted above, portions of these systems already exist in varying degrees, but multiple new transmitting sites are required to improve, extend and more fully develop the underlying service, particularly given the competitive necessity of upgrading to FLEX capability.

To implement these plans, ProNet intended to invest millions of capital dollars for equipment and personnel in the coming months. Due to the Interim Proposal, ProNet has been forced to defer these plans, which include the following specific investments:

- Equipment-- Orders for 400 to 600 paging transmitters from various vendors will be cancelled. Many of these transmitters were necessitated by ProNet's plan to convert existing systems to or build new systems with the FLEX protocol, which the Interim Proposal effectively precludes. In addition, ProNet has purchased and taken delivery of an additional 170 transmitters whose installation is enjoined by the Interim Proposal.

- Personnel-- Due to postponed equipment installation and the corresponding anticipated decline in marketing, forty (40) recent hires will be terminated, and one hundred (100) new positions will not be filled.

- Contractual-- An infrastructure agreement whereby ProNet and another carrier share the development and operating costs of a 200 site, wide-area network, thereby providing both parties with reduced total costs and increased economies of scale, will not be executed, due to uncertainties regarding licensing of the new sites.

V. THE COMMISSION MUST RESOLVE ADDITIONAL LICENSING ISSUES NOT ADDRESSED IN THE INTERIM PROPOSAL

In its Interim Proposal, the Commission failed to address certain applications, amendments and special requests which are of vital importance to existing paging carriers. To ensure that existing operations are not disrupted during the pendency of the NPRM, the Commission must address the following:

A. Section 22.142(d) Relocation Requests

Section 22.142(d) of the Commission's Rules provides that a licensee who loses an authorized transmitting site prior to the end of the one-year construction period due to circumstances beyond its

control may file an application requesting relocation of the transmitter; the construction period is automatically extended pending disposition of the relocation application. This rule provision exists because paging licensees, particularly large and growing carriers with an ongoing program of transmitter installations, often lose transmitting sites when tower owners lease unavailable space, evict lessees to make room for new users, or fail to maintain an adequate support or infrastructure for the site.

The Commission recognizes (NPRM at paras. 39, 140) that incumbent licensees should be allowed to relocate existing facilities when compelled by circumstances beyond their control. Section 22.142(d) extends the same protection for previously authorized facilities, enabling the affected carrier to modify its network to replace the lost site. Accordingly, the Commission should expressly state that, during pendency of the NPRM, holders of construction authorizations and incumbent licensees will be able to file applications to replace sites lost due to circumstances beyond their control.

B. Non-Exclusive PCP Channels Including Special Emergency Radio Service ("SERS")

Due to a clerical error in the NPRM (at para. 149), as well as informal reports from a PCIA representative based on discussions with Commission staff, the status of non-exclusive PCP channels under the Interim Proposal needs clarification. Because the Commission's intentions for these channels is highly unsettled (NPRM at paras. 31-32), licensing should proceed while this

rulemaking is pending. Although this appears to be the clear intent of the Interim Proposal (NPRM at para. 149), the Commission should plainly state that this is the case to extinguish any lingering doubt.

Consistent with their classification as PMRS, SERS paging channels receive no mention in the NPRM. To eliminate confusion, the Commission should specifically state that these frequencies--152.0075, 163.250 and, conditionally, 453.025, 453.075, 453.125 and 453.175 MHz-- are expressly exempt from the Interim Proposal and the NPRM's market area, exclusive licensing proposals. The affirmative statement requested here will provide needed assurance to ProNet and other SERS licensees that they can proceed to add and relocate transmitters to their licensed systems in accordance with the emergency communication needs of the medical community they serve.

ProNet's medical paging systems in Los Angeles, CA, Boston, MA, and New York, NY operate on non-SERS channels.[24/] The Los Angeles and Boston systems operate on non-exclusive PCP channels and, consistent with the interpretation of the NPRM's para. 149 stated above, should be exempt from the Interim Proposal. The New York system utilizes an exclusive 929 MHz channel. The public interest considerations regarding SERS apply equally to these systems, and the Commission should entertain waivers of the Interim Proposal for systems providing emergency medical paging to SERS

[24/] The Los Angeles and Boston systems operate on 462.875 MHz; the New York system operates on 929.3625 MHz.